TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 137

LURTON LEWIS HEFLIN, JR., PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petition for Certiorari Filed March 31, 1958
Certiorari granted June 30, 1958

SUPREME COURT OF THE UNITED STATES

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INDEX

I

1 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16901

LURTON LEWIS HEFLIN, JR., *Defendant-Appellant*

v.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

Motion for Leave to Proceed on Appeal in This Court on Original Record and Typewritten Briefs—Filed Sept. 28, 1957

Lurton Lewis Heflin, Jr., the appellant in the above entitled cause respectfully asks leave of this Honorable Court for permission to proceed on appeal on the original record from the court below and on typewritten briefs.

IN SUPPORT HEREOF, petitioner states as follows:

That he is imprisoned in the United States Penitentiary, Alcatraz, California, and if he were required to proceed on printed records and briefs it would work a great hardship upon him.

That he has no attorney and has prepared his briefs in propria persona.

That he verily believes he has a meritorious cause and is proceeding in this Court in good faith.

Respectfully submitted,

LURTON LEWIS HEFLIN, JR.
Lurton Lewis Heflin, Jr.
Box 1189
Alcatraz, California

1a IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Title omitted)

Appeal from the United States District Court
for the Northern District of Alabama

Order Granting Leave to Proceed on Original Typewritten Record and to File Typewritten Briefs—Sept. 28, 1957

ON CONSIDERATION of the Motion filed by appellant in the above entitled cause,

IT IS ORDERED that Appellant be, and he is hereby granted permission to prosecute his appeal in this Court on the original certified typewritten transcript of record.

IT IS FURTHER ORDERED that Appellant be permitted to file four typewritten copies of his brief, in lieu of printed copies.

(Signed) JOHN MINOR WISDOM
U. S. Circuit Judge.

September 28, 1957

1b IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

Docket Entries

Criminal Docket 13530—Southern

THE UNITED STATES

v.

1. SAMUEL JAY HORNBECK, alias Lawrence K. Baker, alias Jerome E. Bryant, alias Jerry Bryant

2. CLETUS JOSEPH GOLDMAN, alias John L. Scott

3. LURTON LEWIS HEFLIN, JR., alias "Junior" Heflin

For Defendant:

5/3/54—John Tucker apptd for # 3

Violation:

18 USC 2113(a)—take by force money of bank, member of Federal Reserve System, count 1

18 USC 2113(b)—take money of bank member of Federal Reserve System, count 2;
18 USC 2113(d)—take by force money of member bank of Fed. Res., ct. 3
18 USC 2113(c)—receive stolen money, knowing same to be stolen from bank, ct. 4
18 USC 371—conspiracy to rob member bank of Federal Reserve, ct. 5

CASH RECEIVED AND DISBURSED

Date	Name
1957	
Aug. 26	MO—E. H. Heflin for L. L. Heflin, Jr.—Not of Appeal Received—$5.00

PROCEEDINGS

Date
1954
Feb. 26 Indictment filed
Feb. 26 General order for warrant filed and entered; warrants issued for Hornbeck and Goldman (shl)
Apr. 19 Order arraignment, waiver of counsel, and plea of not guilty entered as to Lurton Lewis Heflin, Jr.; order continuing for trial entered—hhg
Apr. 22 Petition for writ of habeas corpus ad prosequendum filed and order allowing filed and entered; writ issued—hhg
Apr. 26 One praecipe filed; 29 subpoenas issued for the United States
May 4 One praecipe filed; 1 subpoena issued for the United States
May 5 Petition for writ of habeas corpus ad test filed and order allowing filed and entered. hhg Writ issued

2 PROCEEDINGS

Date
1954
May 6 Two praecipes filed; 3 subpoenas issued for the United States
May 7 Petition of defendant Lurton Lewis Heflin for witnesses under Rule 17 b. filed. Motion to take depositions of Hornbeck and Denton filed and order overruling entered—hhg

May 7 Order allowing defendant Heflin to subpoena witnesses under Rule 17 b filed and entered. shl Two subpoenas issued for defendant

May 12 Order waiver of counsel as to Cletus Joseph Goldman. entered and plea of guilty entered

May 12 Motion of Lurton Lewis Heflin, Jr. for continuance, and order overruling entered; motion of Heflin to take deposition of Hornbeck refiled and order overruling entered; motion to take deposition of Denton refiled and order overruling entered

May 12 Motion to dismiss indictment filed as to Heflin and order overruling entered

May 12 Lurton Lewis Heflin, Jr., on trial before the Hon. H. H. Grooms and a jury and one alternate; introduction of government's testimony; daily adjournment; jury separated for night by agreement of counsel

May 13 Trial resumed; government's testimony continued; daily adjournment; jury separated by agreement of counsel for night

May 14 Trial resumed; motion of defendant for judgment of acquittal filed and order overruling entered; motion renewed to take deposition of Hornbeck and order overruling entered: introduction of defendant's testimony; daily adjournment; jury separated for night by agreement of counsel

May 15 Trial resumed; defendant's testimony continued; government's rebuttal testimony; motion for judgment of acquittal renewed and order overruling entered; motion for mistrial and order overruling entered; argument of counsel; oral charge of the court; Jury and Verdict Guilty filed as to Heflin; order continuing to May 17 for sentence entered (HHG)

May 17 Sentence: Lurton Lewis Heflin, Jr.—Ten (10) Years under count 3; Five (5) Years under count 1; Three (3) Years under count 5; One (1) Year and One (1) Day under count 2; One (1) Year and One (1) Day under count 4; all sentences to run consecutively with each other in the order recited and not to run concurrently with any other sentence, state or federal (total of 20 years and 2 days) GROOMS, J.

(reduced to 14 years 1 day on 8-14-55)

May 17 Temporary commitment issued as to Heflin
May 17 Certified copies of judgment and commitment delivered to United States marshall and to Heflin

Date
1954
May 20 Motion for new trial filed on behalf of Lurton Lewis Heflin, Jr.
May 7 Order overruling motion to take deposition of Samuel Jay Hornbeck filed and entered. shl
May 25 Writ of habeas corpus ad test returned executed and filed as to Patsy Ruth Hornbeck
May 25 Writ of habeas corpus ad pros returned executed and filed as to Cletus Joseph Goldman
June 10 Motion of defendant Lurton Lewis Heflin, Jr., to appeal in forma pauperis, filed.
June 30 Order overruling motion for new trial filed and entered. hhg
Copy mailed to counsel for defendant
June 30 Order allowing appeal in forma pauperis, filed and entered. hhg
July 8 Notice of Appeal filed in forma pauperis as to Heflin
July 8 Temporary commitment returned executed and filed as to Heflin
July 8 Final commitment returned executed and filed as to Heflin (Atlanta)
July 9 Clerk's Statement of Docket Entries mailed to U. S. Court of Appeals, together with duplicate notice of appeal
Aug. 13 Order extending time for filing record of appeal until Sept. 20, 1954, (HHG) transmitted to U.S.C.A. for filing
Aug 19 Stenographic record of proceedings had Apr 19 & May 17 '54, filed
Aug. 19 Stenographic record of proceedings had May 12, 1954, filed
Sept. 2 Order to transmit certain original exhibits with record on appeal filed and entered. hhg

Date
1955
Sept. 7 Mandate of U. S. Court of Appeals dated September 6, 1955, reciting opinion of June 15, 1955, reversing convictions under counts 1 and 2, and affirming convictions under counts 3, 4, and 5; filed
Sept. 14 Order correcting judgment and commitment of Lurton Lewis Heflin to show defendant is guilty under counts 3, 4, and 5, and sentencing him to 10 years under count three; three years under 5 to begin upon expiration of sentence imposed under count three; one year and one day under count 4 to begin upon expiration of sentence imposed under count 5—Grooms, J.
Certified copies delivered to United States marshal
Nov. 10 Stenographic record of proceedings had May 12, 1954, filed
Nov. 28 Sentence: Cletus Joseph Goldman: Five (5) years, to run concurrently with sentence defendant is now serving—Grooms, J.

Date
1955
Nov. 28 Certified copies of judgment and commitment delivered to United States marshal as to Cletus Joseph Goldman
Dec. 14 Motion of United States to abate indictment filed and order abating indictment as to Samuel Jay Hornbeck filed and entered. hhg
Certified copy delivered to U. S. Marshal

1956
Jan. 18 Commissioner's proceeding filed as to Hornbeck
Jan. 18 Commissioner's proceeding as to Goldman filed
Jan. 18 Final commitment as to Goldman returned executed and filed (Danbury, Conn.)
Jan. 18 Writ ad test as to Goldman returned executed and filed
Jan. 18 Warrant as to Hornbeck returned unexecuted and filed (defendant executed in Fla.)
July 18 Stenographic record of proceedings had 11/28/55 filed

Date	
1957	
May 14	Motion for correction of sentence filed by defendant Lurton Lewis Heflin, Jr. Copy served on U. S. Attorney
July 29	Order overruling motion to correct sentence filed and entered. hhg Certified copies transmitted to movant and movant's counsel
Aug. 26	Notice of appeal filed by Lurton Lewis Heflin, Jr.
Aug. 26	Designation of record, filed

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6 (File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

No. 13530

UNITED STATES OF AMERICA

v.

SAMUEL JAY HORNBECK,
alias Lawrence K. Baker,
alias Jerome E. Bryant,
alias Jerry Bryant
CLETUS JOSEPH GOLDMAN,
alias John J. Scott
LURTON LEWIS HEFLIN, JR.,
alias "Junior" Heflin,

Indictment—Filed Feb. 26, 1954

COUNT ONE: (18 U.S.C. 2113(a))

The Grand Jury charges:

That on or about the 23rd day of January, 1953, at or near Birmingham, within the Southern Division of the Northern District of Alabama, the defendants,

SAMUEL JAY HORNBECK,
alias Lawrence K. Baker,
alias Jerome E. Bryant,
alias Jerry Bryant
CLETUS JOSEPH GOLDMAN,
alias John J. Scott
LURTON LEWIS HEFLIN, JR.,
alias "Junior" Heflin,

whose names are otherwise unknown to the Grand Jury, and are hereinafter denominated defendants, did, unlawfully, wilfully, knowingly and feloniously, and by force and violence, and by intimidation, take from the person and presence of one Lawrence H. Brice, money exceeding the value of $100.00, to wit: Fifty-Three Thousand One Hundred Seventy-two Dollars and Seventy-Three Cents ($53,172.73), in currency of the United States, said money then and there belonging to, and being in the care, custody, control, management and possession of the West End Branch of the First National Bank of Birmingham, Alabama, located at Birmingham, Alabama, which said bank is, and at all times herein mentioned was, organized and operating under the laws of the United States, and a member of the Federal Reserve System.

7 COUNT Two: (18 U.S.C. 2113(b))

The Grand Jury further charges:

That on or about the 23rd day of January, 1954, at or near Birmingham, within the Southern Division of the Northern District of Alabama, the defendants,

SAMUEL JAY HORNBECK,
alias Lawrence K. Baker,
alias Jerome E. Bryant,
alias Jerry Bryant
CLETUS JOSEPH GOLDMAN,
alias John J. Scott
LURTON LEWIS HEFLIN, JR.,
alias "Junior" Heflin,

whose names are otherwise unknown to the Grand Jury, and are hereinafter denominated defendants, did, unlawfully, wilfully, knowingly, and feloniously take and carry away, with intent then and there to steal and purloin, money, exceeding the value of $100.00, to wit: Fifty-Three Thousand One Hundred Seventy-Two Dollars and Seventy-Three Cents ($53,172.73), in currency of the United States, said money then and there belonging to, and being in the care, custody, control, management and possession of the West End Branch of the First National Bank of Birmingham, Alabama, located at Birmingham,

Alabama, which said bank is, and at all times herein mentioned was, organized and operating under the laws of the United States, and a member of the Federal Reserve System.

COUNT THREE: (18 U.S.C. 2113(d))

The Grand Jury further charges:

That on or about the 23rd day of January, 1953, at or near Birmingham, within the Southern Division of the Northern District of Alabama, the defendants,

SAMUEL JAY HORNBECK,
alias Lawrence K. Baker,
alias Jerome E. Bryant,
alias Jerry Bryant
CLETUS JOSEPH GOLDMAN,
alias John J. Scott
LURTON LEWIS HEFLIN, JR.,
alias "Junior" Heflin,

whose names are otherwise unknown to the Grand Jury, and are hereinafter denominated defendants, did, unlawfully, wilfully, knowingly, and feloniously, and by force and violence, and by intimidation, take from the person and presents of one Lawrence H. Brice, money exceeding the value of $100.00, to wit: Fifty-Three Thou-
8 sand One Hundred Seventy-Two Dollars and Seventy-Three Cents ($53,172.73), in currency of the United States, said money then and there belonging to, and being in the care, custody, control, management and possession of the West End Branch of the First National Bank of Birmingham, Alabama, located at Birmingham, Alabama, which said bank is, and at all times herein mentioned was, organized and operating under the laws of the United States, and a member of the Federal Reserve System; and in the taking and carrying away of said money, as aforesaid, the said defendants did, then and there, unlawfully, wilfully, knowingly, and feloniously, assault and jeopardize the lives of the said Lawrence H. Brice and Louis L. Sandefur, William R. Zeigler, Emily Hicks, Elnora Moore, Ann Yarbrough, Elizabeth Prater, Barbara Lovingood, Jean Glover, Mildred Glenn, Doris

Loden, and Betty Johnson by the use of dangerous weapons, to wit: pistols and revolvers, which said pistols and revolvers said defendants did then and there unlawfully point at the persons of the said Lawrence H. Brice and Louis L. Sandefur, William R. Zeigler, Emily Hicks, Elnora Moore, Ann Yarbrough, Elizabeth Prater, Barbara Lovingood, Jean Glover, Mildred Glenn, Doris Loden, and Betty Johnson.

COUNT FOUR: (18 U.S.C. 2113(c))

The Grand Jury further charges:

That between the dates January 23, 1953, and continuously, to wit: February 24, 1954, at or near Birmingham, within the Southern Division of the Northern District of Alabama, the defendants,

SAMUEL JAY HORNBECK,
alias Lawrence K. Baker,
alias Jerome E. Bryant,
alias Jerry Bryant
CLETUS JOSEPH GOLDMAN,
alias John J. Scott
LURTON LEWIS HEFLIN, JR.,
alias "Junior" Heflin,

whose names are otherwise unknown to the Grand Jury, and are hereinafter denominated defendants, did, unlawfully, wilfully, and knowingly, receive, possess, conceal, store, and dispose of money in excess of the value of $100.00, to wit: Fifty-Three Thousand One Hundred Seventy-Two Dollars and Seventy-Three Cents ($53,172.73) in currency of the United States, said defendants then and there knowing said money to have been taken and carried away from the care, custody, control, management, and possession of the West End Branch of the First National Bank
9 of Birmingham, Alabama, said Bank located in Birmingham, Alabama, within the Southern Division of the Northern District of Alabama, with the intent then and there to steal and purloin the same, said Bank then and there, and at all times herein mentioned being organized and operating under the laws of the United States, and a member of the Federal Reserve System.

COUNT FIVE: (18 U.S.C. 371)

The Grand Jury further charges:

That heretofore, to wit, at sometime during the period commencing on or about January 1, 1953, and extending to on or about, to wit, February 24, 1954, the said defendants SAMUEL JAY HORNBECK, alias Lawrence K. Baker, alias Jerome E. Bryant, alias Jerry Bryant, CLETUS JOSEPH GOLDMAN, alias John J. Scott, LURTON LEWIS HEFLIN, JR., alias "Junior" Heflin, and others, whose names to the Grand Jury are unknown, hereinafter denominated defendants, did, within the Southern Division of the Northern District of Alabama, and within the jurisdiction of this Honorable Court, unlawfully, wilfully, knowingly, and feloniously combine, conspire, confederate, and agree together and with each other and with other persons whose names to the Grand Jury are unknown, to commit various offenses against the United States, to wit: the offenses denounced by Sections 2113(a), 2113(b), 2113(c), and 2113(d), Title 18, U.S.C., said offenses being set forth in Counts 1, a, 3, and 4 of this indictment, which said counts are all hereby realleged and reaffirmed as if set forth at length herein, and hereby made a part of this count.

And in furtherance of said unlawful combination, conspiracy and agreement, and for the purpose of effecting the object thereof, said defendants herein named did commit and do the following overt acts:

1. On or about January 23, 1953, the said defendants did, at Birmingham, Alabama, in Jefferson County, within the Northern Judicial District of Alabama, unlawfully, wilfully, knowingly and feloniously take and carry away, with intent then and there to steal and purloin, money, exceeding the value of $100.00, to wit: Fifty-Three Thousand One Hundred Seventy-Two Dollars and Seventy-Three Cents, ($53,172.73) in currency of the United States, said money then and there belonging to and being in the care, custody, control, management and possession of the West End Branch of the First National Bank of Birmingham at Birmingham, Alabama, which said Bank is, and at all times herein mentioned was, organized and op-

erating under the laws of the United States, and a member of the Federal Reserve System.

A True Bill

N. C. WALLACE, JR.
Foreman of the Grand Jury

[Signature Illegible]
United States Attorney

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11 IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mandate—September 6, 1955

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judge of the United States District Court for the Northern District of Alabama—Greetings:

WHEREAS, lately in the United States District Court for the Northern District of Alabama, before you, in a cause between United States of America, plaintiff, and Lurton Lewis Heflin, Jr., alias "Junior" Heflin, defendant, Criminal No. 13530, wherein the judgment of the District Court entered in said cause on the 17th day of May, A. D., 1954, was in favor of plaintiff, United States of America, and against defendant, Lurton Lewis Heflin, Jr., alias "Junior" Heflin, as by the inspection of the transcript of record of the said District Court, which was brought into the United States Court of Appeals for the Fifth Circuit, by virtue of an appeal sued out by Lurton Lewis Heflin, Jr., agreeably to the act of Congress in such case made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord one thousand nine hundred and fifty-four, the said cause came on to be heard before the said United States Court of Appeals, on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the convictions of counts 1 and 2 of the said District Court in this cause be, and they are hereby, reversed; the convictions of counts 3, 4 and 5, be, and they are hereby, affirmed; and that this cause be,

and it is hereby, remanded to the said District Court for vacation of the erroneous sentence and the imposition of sentence in accordance with the principles expressed in the opinion of this Court.

June 15, 1955.

12 YOU, THEREFORE, ARE HEREBY COMMANDED that such execution and further proceedings be had in said cause as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding.

WITNESS the Honorable EARL WARREN, Chief Justice of the United States, the 6th day of September, in the year of our Lord one thousand nine hundred and Fifty-five.

JOHN A. FEEHAN, JR.
Clerk, U. S. Court of Appeals
for the Fifth Circuit.

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13 (File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

No. 13530

UNITED STATES OF AMERICA

v.

LURTON LEWIS HEFLIN, JR., *alias* "Junior" Heflin

Corrected Judgment and Commitment—September 14, 1955

WHEREAS, the defendant, Lurton Lewis Heflin, Jr., was convicted upon his plea of not guilty by a jury verdict of guilty for the offense of:

on or about January 23, 1953, feloniously and by force and violence, and by intimidation, taking from the person and presence of a certain person, money exceeding the value of $100, said money then and there belonging to, and being in the custody and possession of a bank organized and operating under the laws of the United States and being a member of the Federal

Reserve System, as charged in *count one* of the indictment;

on or about January 23, 1953, feloniously taking and carrying away, with intent to steal, money exceeding the value of $100, said money belonging to, and being in the custody of, a bank organized and operating under the laws of the United States, and being a member of the Federal Reserve System, as charged in *count two* of the indictment;

on or about January 23, 1953, feloniously and by force and violence, and by intimidation, taking from the person and presence of a certain person money exceeding the value of $100, which money belonged to, and was in the custody of a bank organized and operating under the laws of the United States and being a member of the Federal Reserve System, and in the taking and carrying away of said money, assaulting and jeopardizing the lives of certain persons by the use of dangerous weapon, or weapons and by pointing a pistol or revolver at the persons of certain people, as charged in *count three* of the indictment;

between the dates of January 23, 1953, and continuously to, to-wit: February 24, 1954, receiving, possessing, concealing, storing, and disposing of money in excess of the value of $100, knowing said money to have been taken from the care, custody, control, and possession of a member bank of the Federal Reserve System, with intent to steal and purloin said money, as charged in *count four* of the indictment.

on, to-wit, January 1, 1953, and extending to or about February 24, 1954, combining, conspiring, and agreeing with each other and with divers persons to commit various offenses against the United States as set out in Sections 2113(a), 2113(b), 2113(c), and 2113(d), Title 18, U.S.C., to-wit, taking money belonging to a member bank of the Federal Reserve System by force and violence and putting persons in jeopardy of their lives by use of a dangerous weapon in so doing, and with intent to steal said money, and receiving, possessing, and disposing of money stolen from a member bank of the Federal Reserve System, knowing same to have been stolen, as charged in *count five* of the indictment.

14 AND WHEREAS, the United States Court of Appeals for the Fifth Circuit on the 15th day of June, 1955, ordered and adjudged that the convictions of this defendant under counts one and two be reversed and vacated, and, further, that the convictions of this defendant under counts three, four, and five be affirmed,

AND WHEREAS, the said United States Court of Appeals for the Fifth Circuit on the 6th day of September, 1955, issued to this Court a mandate ordering this Court to put such into effect:

It is, therefore, the ORDER and JUDGMENT of this Court that the defendant is guilty as charged and convicted under counts three, four, and five.

It is the further ORDER and JUDGMENT of this Court that the convictions of this defendant under counts one and two are hereby vacated and set aside.

It is the further ORDER and JUDGMENT of this Court that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years under count three; three (3) years under count five to begin upon the expiration of the sentence imposed under count three; one (1) year and one (1) day under count four to begin upon the expiration of the sentence imposed under count five.

It is ADJUDGED that no sentence imposed under any count shall run concurrently with the sentence imposed under any other count; but said sentences are to run consecutively. It is further ORDERED that the sentences in this case are not to run concurrently with the sentence of any state or federal court heretofore imposed, or which may hereafter be imposed.

It is ORDERED that the clerk deliver three certified copies of this corrected judgment and commitment to the United States marshal or other qualified officer and that a copy serve as the commitment of the defendant.

DONE, this the 14 day of September, 1955.

H. H. GROOMS
H. H. Grooms
United States District Judge

15 (File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

(Title omitted)

Motion for Correction of Sentence—Filed May 14, 1957

The Motion For Correction of Sentence of LURTON LEWIS HEFLIN, JR. represents as follows:

1. That this motion is filed pursuant to Rule 35, Fed. Rules of Criminal Procedure and/or Title 28, USCA, 2255.

2. That the defendant is presently confined in the United States Penitentiary, Alcatraz, California under the judgment and commitment of this Court.

3. That the defendant is serving consecutive sentences for violation of Subsections of Title 18, USCA, 2113 as follows: Subsection (d)—ten (10) years; Subsection (c)—one (1) year and one (1) day.

4. That defendant moves that the sentence under Count IV (18 § 2113(c)), be vacated and the judgment and commitment be corrected to reflect said vacation.

5. That defendant submits that the aforesaid sentence under Count IV is illegal for the following reasons, to-wit:

(a) Congress did not intend that the "taker" in a bank robbery be subjected to additional punishment for receiving, concealing, storing and disposing of the same money he is charged with taking.

(b) The offense described in Count IV of the indictment merged in to the greater offense of bank robbery charged in Count III.

6. That a memorandum is filed herewith and made a part hereof in support of this motion.

WHEREFORE, defendant prays that the sentence of one year and one day imposed on Count IV of the indictment be vacated and the commitment be corrected.

Respectfully submitted,

LURTON L. HEFLIN, JR.
Lurton Lewis Heflin, Jr.

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16 Cr. No. 13530

(Title omitted)

Memorandum in Support of Motion for Correction of Sentence—Filed May 14, 1957

Rule 35, Federal Rules of Criminal Procedure provides that: "The Court may correct an illegal sentence at any time."

Title 28, USCA, 2255 provides that a motion to correct an illegal sentence may be made at any time. An attack by motion under § 2255 is not premature if filed during first of consecutive sentences. *Young* v. *United States*, 190 F. 2d 558.

(A)

Congress did not intend that the "taker" in a bank robbery be subject to additional punishment for receiving and disposing of the same money he is charged with taking.

Count IV charged that defendant did: "receive, possess, conceal, store and dispose of money" that he is charged with taking in Count III.

By the text of Section 2113 (c) it is evident that it was the intention of Congress in enacting Subsection (c) of the bank robbery statute (2113) that it was applicable *only* to others than those prosecuted and convicted as the "takers".

In pertinent part, Subsection (c) reads as follows:

> "* * * in violation of subsection (b) of this section *shall be subject to the punishment provided by subsection (b) for the taker.*" (Emphasis supplied)

The phrase "for the taker" makes it clear that Congress intended this statute to punish others than those punished as the actual takers. The petitioner was convicted and

sentenced under Subsection (d) (Count III) as the taker under aggravated circumstances. It is obvious that the constitutional prohibition against subjecting a defendant to more than one punishment in the federal courts for the same offense would bar a separate sentence for taking, receiving, possessing, concealing, storing and disposing of the same money. They were all ingredients of a single transaction, i.e., bank robbery.

17

The original Bank Robbery Act was passed in 1934, 48 Stat. 783. It covered only robbery, robbery accompanied by an aggravated assault, and homicide perpetrated in commiting a robbery or escaping thereafter. In 1937 the Attorney General requested that the Act be amended. The act was amended accordingly to add other crimes less serious than robbery. The object of this revision was to bring lesser offenders within the scope of the bank robbery act. *Prince* v. *United States,* 77 S. Ct. 403. The defendant was punished as the robber (Count III) and as the receiver, etc., (Count IV). The case of *Prince* v. *United States* is now controlling. The sentence on Count IV should be vacated.

(B)

The offense described in Count IV of the indictment merged into the greater offense of bank robbery charged in Count III.

The Circuit Courts have consistently held that only *one* sentence may be imposed upon any and all of the subsections of Section 2113. This rationale has recently been upheld in *Prince* v. *U. S.*, supra.

In *Lockart* v. *United States,* 136 F. 2d 122, 124, the court said:

> "Although the indictment contained three counts, *the statute upon which it was based creates only one crime.*" (Emphasis supplied)

A case four square with the position of the defendant is *United States* v. *Gebbart,* D.C. Neb., 1947, 70 F. Supp. 824, affirmed 163 F. 2d 962:

> "Where act involved in several counts of indictment under former section 588(b) of Title 12 dealing

with robbery of bank, of assault in committing or attempting to commit bank robbery, *and receiving or disposing stolen goods, is the same, a single offense is committed for which only a single sentence may be imposed.*"

Cases which hold that the subsections of section 2113 are merged into the most aggravated circumstances and upon which but a single sentence may be impose are:

United States v. *Gebbart*, 163 F. 2d 962
Prince v. *United States*, 77 S. Ct. 402
Lockart v. *United States*, 136 F. 2d 122, 124
Dimenas v. *United States*, 130 F. 2d 465, 466
Wells v. *United States*, 124 F. 2d 334, 335
18 *Hewitt* v. *United States*, 110 F. 2d 1, 11
Durrett v. *United States*, 107 F. 2d 438, 439
United States v. *LaMolinare*, 55 F. Supp. 730
Miller v. *United States*, 147 F. 2d 372
O'Keith v. *United States*, 158 F. 2d 591, 592
Simunov v. *United Staes*, 162 F. 2d 314
Garrison v. *Reeves*, 116 F. 2d 978
Holiday v. *United States*, 130 F. 2d 988
Wilson v. *United States*, 145 F. 2d 734, 736
Holbrook v. *United States*, 149 F. 2d 230
United States v. *Trumblay*, 141 F. Supp. 80

As the defendant was sentenced under subsection (d), by the applicable law the offense charged under Count IV (subsection (C) merged into the greater offense charged in Count III, (subsection (d).

Conclusion

The defendant was sentenced under Subsection (d) which encompassed the included offense of receiving, possessing, concealing, storing and disposing of the money he was accused of taking under Count III. The sentence of one year and one day imposed under Count IV therefore should be vacated.

Lurton L. Heflin, Jr.
Lurton Lewis Heflin, Jr.,
Defendant

19 (File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

(Title omitted)

Decree Denying Defendant's Motion for Correction of Sentence—July 29, 1957

This cause coming on to be heard on the motion docke of July 29, 1957, at 9:30 o'clock, a.m., was submitted to th court on the motion of the defendant of the Lurton Lewi Heflin, Jr., for correction of a sentence heretofore impose on said defendant. Basically, the contention of the defend ant is grounded on the premise that the offense describe in count four of the indictment (18 U.S.C. 2113(c)) merge into the offense described in count three of said indictmen (18 U.S.C. 2113(d)). The Honorable John S. Tucker, Jr. was duly appointed by the court to represent the interest of said defendant on his said motion. After due considera tion of said motion, the court is of the opinion that sai motion presents solely a question of law and that the fil and records conclusively show that the defendant is en titled to no relief. See *Heflin* v. *United States,* 5th Cir. 223 F. (2) 371, 376. Cf *Horn* v. *United States,* 5th Cir. decided June 10, 1957, which cited *Prince* v. *United States* 352 U.S. 322, as not holding contra.

It is therefore, ORDERED, ADJUDGED and DECREED by th court that the defendant's motion for correction of hi sentence be and the same is hereby overruled and denied

DONE and ORDERED this, the 29th day of July, 1957.

H. H. GROOMS
H. H. Grooms
United States District Judge

20 (File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

(Title omitted)

Notice of Appeal—Filed August 26, 1957

Name and Address of Appellant:
Lurton Lewis Heflin, Jr.
Box 1189, Alcatraz, Calif.

Judgment:
14 years and 1 day
Violation Title 18 U.S.C.
Section 2113

Order Appealed From:
Denial of Motion for
Correction of Sentence
(Title 28 U.S.C. Sec. 2255)

Judge Issuing Order:
Hon. H. H. Grooms
District Judge

Date of Order:
July 30, 1957

Notice of appeal is hereby given from the above order to the United States Court of Appeals for the Fifth Circuit.

LURTON LEWIS HEFLIN, JR.

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21 (File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

(Title omitted)

Designation of Record—Filed Aug. 26, 1957

The following records and documents are hereby designated as the record on appeal in the above entitled cause:

1. Docket Entries in Case No. 13530

2. Indictment No. 13530

3. Judgment and Commitment No. 13530

4. Motion to Correct Sentence.

5. Memorandum to Motion.

6. Order Denying Motion.

7. Notice of Appeal.

8. Designation of Record.

LURTON L. HEFLIN, JR.

 IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

(Title omitted)

Designation by Appellee of Additional Matter to be Included in the Record on Appeal—Filed September 3, 1957

Comes the appellee, the United States of America, as authorized by Rule 75(a) of the Federal Rules of Civil Procedure, which said rule is made applicable in criminal proceedings by Rule 39(b)(1) of the Federal Rules of Criminal Procedure, and designates the following additional matter to be included in the record on appeal in this cause in addition to those already designated by the appellant Lurton Lewis Heflin, Jr.:

1. The mandate of the United States Court of Appeals for the Fifth Circuit, in Case Number 15,161, styled Lurton Lewis Heflin, Jr., appellant, vs. United States of America, appellee, and dated September 6, 1955.

WILLIAM G. WEST, JR.,
William G. West, Jr.
Assistant United States Attorney

Certificate of Service

(Omitted in printing)

23 (Clerk's Certificate to foregoing transcript omitted in printing)

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25 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16901

LURTON LEWIS HEFLIN, JR.,

VERSUS

UNITED STATES OF AMERICA.

Submission of Cause—January 9, 1958

On this day this cause was called and, was taken under submission by the Court upon the record and briefs on file.

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26 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16901

LURTON LEWIS HEFLIN, JR., *Appellant,*

VERSUS

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Northern District of Alabama

Per Curiam Opinion—January 24, 1958

Before HUTCHESON, Chief Judge, TUTTLE, Circuit Judge, and HANNAY, District Judge

PER CURIAM: This appeal from an order denying appellant relief in a Section 2255 motion asks us to reverse the judgment we heretofore entered when the case was before us on direct appeal from appellant's conviction. Appellant was convicted on three counts of a bank robbery indictment, including counts based on a violation of

18 U.S.C.A. § 2113(d) and 18 U.S.C.A. § 2113(c). Subsection (d) is the section making criminal the act of taking or attempting to take from the person or presence of another money belonging to a bank, during the commission of which attempt or taking another is assaulted or put in jeopardy by the use of a dangerous weapon. Subsection (c) is the provision that outlaws the receipt, possession, concealment or disposition of money "knowing the same to have been stolen from a bank. . . ."

Upon his original appeal from his conviction we held that "*receiving stolen* money and conspiracy are offenses separate from bank robbery and consist of distinctly different elements." *Heflin* v. *United States*, 5 Cir., 223 F. 2d 371. We thus expressly held that Heflin was not entitled to the relief he here seeks. In the absence of a claim that such prior judgment of this court was in some way brought about under circumstances that would deprive the court of the power to act, we cannot now review or reconsider that judgment. It is not inappropriate, however, to say that we think it perfectly clear that the offenses set out in Sections (c) and (d) are distinct crimes and neither is merged into the other. This court has reaffirmed this view in *Horne* v. *United States*, 5 Cir., 246 F. 2d 83. Nothing in *Prince* v. *United States*, 352 U.S. 322, hold to the contrary.

The judgment is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

No. 16901

LURTON LEWIS HEFLIN, JR.,

VERSUS

UNITED STATES OF AMERICA.

Judgment—January 24, 1958

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court in this cause be, and the same is hereby, affirmed.

30 (Clerk's Certificate to foregoing transcript omitted in printing)

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31 SUPREME COURT OF THE UNITED STATES

(Title omitted)

Order Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari—June 30, 1958

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 1104 and assigned for argument immediately following No. 1102.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1958—477293/P.O. 244

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 137

LURTON LEWIS HEFLIN, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

JEROME A. COOPER
1329 Brown-Marx Building
Birmingham 3, Alabama
Attorney for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 137

LURTON LEWIS HEFLIN, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The decree of the United States District Court for the Northern District of Alabama, denying petitioner's motion for correction of sentence[1] (R. 20) is not reported. The opinion of the United States Court of Appeals, affirming, is reported at 251 F. 2d 69; that Court's prior opinion upon original appeal is reported at 223 F. 2d 371.

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[1] The motion was filed under Rule 35, Federal Rules of Criminal Procedure and, alternatively, under 28 U.S.C. 2255.

Jurisdiction

Judgment of the Court of Appeals was entered January 24, 1958. A petition for certiorari and motion for leave to proceed *in forma pauperis* were filed in this Court on March 31, 1958; both were granted on June 30, 1958. Jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

Questions Presented

1. Can a defendant be punished twice under the Federal Bank Robbery Act, Title 18, U.S.C. Section 2113 (hereinafter called the Act) because his culpable conduct violates the provisions of both subsection (d) and subsection (c) of the Act?

2. Was petitioner properly sentenced under the Act to serve consecutive sentences upon (1) a count charging the offense of bank robbery during the commission of which assault by weapon was committed, and (2) a count charging the receipt, etc., of the money taken in the same robbery?

3. Are bank robbery on the one hand, and receipt and handling of the stolen money on the other, consecutively punishable under the Act in a typical bank robbery situation?

4. Was petitioner subjected to double jeopardy, contrary to the Fifth Amendment, by two punishments imposed upon him as taker and receiver of identical money in a single bank robbery?

Statute and Constitutional Provisions Involved

Title 18, U.S.C. Section 2113 (consolidating sections 588 (a), 588 (b), and 588 (c) of Title 12, U.S.C., 1940 ed.) provides:

"Sec. 2113. *Bank robbery and incidental crimes*

"(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank or any savings and loan association; or

"Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States or any larceny—

"Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

"(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

"Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or posses-

sion of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

"(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

"(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

"(f) As used in this section the term 'bank' means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

"(g) As used in this section the term 'savings and loan association' means any Federal savings and loan

association and any savings and loan association the accounts of which are insured by the Federal Savings and Loan Insurance Corporation."

The Fifth Amendment to the Constitution of the United States provides, in part:

"No person shall . . . be subject for the same offense to be twice put in jeopardy . . ."

Statement

Petitioner was convicted for violation of the Federal Bank Robbery Act. He was originally convicted on four substantive counts and one of conspiracy. Convictions on two counts were reversed on appeal to the Fifth Circuit Court of Appeals taken by other counsel appointed by the District Court;[2] three were affirmed. Petitioner did not take further direct appeal.

His motion for correction of his sentence, under consideration here, was filed *pro se.*

Present counsel for petitioner was appointed by this Court on October 16, 1958.

Petitioner is now serving sentences on three counts providing consecutive terms of ten years (aggravated bank robbery), three years (conspiracy), and one year and a day (receiving stolen money) all relative to the same bank robbery.[3] The courts below have denied his motion to correct his sentence. His motion alleges that he has been subjected to multiple punishment for the same offense in

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[2] The Government admitted error in petitioner's convictions for larceny and robbery under two separate counts based on the same taking of bank funds.

[3] These three counts are based upon subsection (d) of the Act, Title 18, U.S.C. 371, and subsection (c) of the Act, respectively.

violation of the Act and in violation of the Constitution. The motion in terms takes the points (1) that Congress did not intend the "taker" of money in a bank robbery to suffer additional punishment for receiving, etc., the same money, and (2) the lesser offense of "receiving" the stolen money is "merged" into the greater offense of aggravated bank robbery. It is clear, however, from the memorandum accompanying and filed with his motion that petitioner, pleading without aid of counsel, was also raising "the constitutional prohibition against subjecting a defendant to more than one punishment in the federal courts for the same offense . . ." (R. 18).

ARGUMENT

Subsections (d) and (c) of Title 18, U.S.C. 2113 Do Not Authorize Double Punishment for the "Taking" and the "Receiving" of Identical Money in a Single Bank Robbery.

(A)

THE TERMS OF THE STATUTE

One who robs a bank, in so doing both takes and receives and possesses the stolen money. Therefore, a common sense reading of subsections (d) and (c) of the Act indicates a Congressional intent to punish a bank robber also as a "taker" of the stolen money. One not a "taker" and who after the felonious taking is completed deals with the stolen money, knowing it to have been stolen, is punished in the same manner as the taker. Such a one—a "receiver" of stolen money—is not himself a "taker" and is not punished as a "taker".

It is unreasonable to assume that Congress provided a 25 year maximum sentence for one who completes a bank

robbery thereby taking and receiving stolen bank funds, and then provided for an additional ten year sentence for the same receiving. The possibility of maximum punishment (25 years) under subsection (d) of the Act attached the moment petitioner completed the robbery and thereby also committed an act of taking. As a "taker" he of course knew the funds to be stolen and "received" them as such.

In some respects the Act does deal with various stages of a typical bank robbery: This, however, does not mean that the criminal who succeeds in his unlawful enterprise to the extent of accomplishing more than one phase of it, as the statute defines the phases, can be punished for more than one crime. The Fifth Circuit's incorrect view[4] to that effect was set aright in *Prince* v. *U. S.*, 352 U.S. 322, 77 S.Ct. 403.

(B)

The Legislative History and Prince v. U. S., 352 U.S. 322, 77 S.Ct. 403

Legislative history of the Act is limited. Accordingly, as this Court's recent inquiry has shown, such history throws little light upon the problem of whether crimes "incidental to and related to thefts from banks" are collectively punishable in a typical bank robbery situation. Cf. *Prince* v. *U. S.*, 352 U.S. 322, 323, 77 S.Ct. 403, 404.

The original Bank Robbery Act (48 Stat. 783) was passed in 1934 to cover only robbery, robbery accompanied by an aggravated assault, and homicide perpetrated in committing a robbery or in subsequent escape. In 1937 amendments were enacted "to add other crimes less serious than robbery." *Id.* at 326; 405. The list of these less serious crimes was further augmented by the amendment of 1940,

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[4] *Prince* v. *U. S.*, 5 Cir., 230 Fed. 2d 568, 570.

54 Stat. 695, adding subsection (c) with which we are here concerned. As presently constituted, the Act without substantial change derives from Title 12 U.S.C. (1946 ed.) Sec. 588 (a), (b) and (c).

It is now settled that each violation of the Act's proscriptions of less serious crimes cannot serve as a basis for a separate sentence to run consecutively with sentence for the related completed crime of robbery. Clearly, subsection (a) cannot do so; that provision respecting unlawful entry was inserted only to cover the situation where a person enters a bank for the purpose of committing a robbery, but is frustrated for some reason before completing the crime. *Id.* at 328; 406.

In like manner, we submit, the provisions of subsection (c) respecting receipt, possession or disposition of funds stolen from a bank must be deemed to have been inserted to cover only an individual not involved in the actual robbery but who becomes involved thereafter with the fruits of the felony.

Prince found no reason to assume Congressional intent to pyramid penalties for a lesser offense (unlawful entry) preceding robbery. There is no more reason here to assume Congressional intent to pyramid penalties for a lesser offense (receipt and disposition of stolen property) following robbery. One lesser offense as much merges into the completed major crime of robbery as does the other.

The amendment of 1937, in making unlawful entry into a bank a separate offense, of course in a sense implemented the Act. That is precisely the end accomplished by the amendment of 1940 in making receipt and handling of stolen bank property a separate offense. In the one, Congress extended the net to would-be robbers who fail of their purpose prior to a robbery. In the other, Congress likewise reached those who have not actually robbed but

who become involved with stolen bank funds after a robbery.

Neither amendment included a new and separate penalty clause. They are both related to the principal act of bank robbery, for which Congress designed major punishment. One amendment simply deals with problems arising before, the other with problems arising after, that principal criminal act.

Actually, the legislative history of the 1940 amendment, more clearly than in the case of the 1937 amendment, indicates Congressional concern "only with proscribing additional activities and not with alteration of the scheme of penalties." Cf. *Prince, supra*, footnote 10.

Senate Report No. 1801, 76th Cong., 3rd Session, recommended the enactment of the 1940 amendment which added subsection (c) to the Act. That report, and the companion House Report,[5] both set out an accompanying letter from the Attorney General suggesting passage of the subsection. The Attorney General's letter does not indicate any departure from the purpose which had inspired the 1937 amendment. His purpose had been only to add other crimes less serious than robbery. Indeed, Senate Report No. 1801 itself is definitively captioned "Punishment for Receivers of Loot From Bank Robbers" and in its body states "This bill would add another subsection to further make it a crime, with less severe penalties (maximum $5,000 and 10 years imprisonment or both) to wilfully become a receiver or possessor of property taken in violation of the statute." Thus, subsection (c) was not designed to authorize any change in the punishment for ~~him who robs~~; it only provided punishment for one who receives loot from the robber.

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[5] House Report No. 1668, 76 Cong. 3rd Session. There were no Congressional debates upon the bill which became subsection (c).

As *Prince* v. *U. S.* explains, one who at the same time violates subsection (a) of the Act by entry and subsections (b) or (d) by completing a robbery, is subject to but one sentence. Comparably to the conclusion reached in *Prince*, there is no reason here to assume Congress intended to make drastic changes in authorized punishment for one who completes a bank robbery and in so doing violates subsections (a) by entry, (b) or (d) by robbery, and (c) by receiving and handling the stolen funds.

At one stage of this proceeding, the Government itself has admitted that at least some of the proscriptions of the Act, i.e., in subsections (a), (b) and (d), will not each support a separate sentence.[6] The admission indicated agreement that the act of taking is not itself to be treated as an offense separate from a completed robbery. Whether such admission rests upon the doctrine of merger or upon presumed Congressional intent (Cf. discussion by the Fifth Circuit in *Prince* v. *U. S.*, 230 Fed. 2d 568, 571) certainly it tends to support our position here that an accused sentenced for bank robbery is not to be sentenced consecutively for separate phases of the same robbery.

(C)

In summary, petitioner rests his case largely upon what was held in *Prince*, and upon the characterization of the Act there spelled out.

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[6] See decision of Court of Appeals, Fifth Circuit, on original appeal, 223 F.2d 371, 376. Subsequent shifting of the Government's position on that admission, Cf. *Prince* v. *U. S.*, 352 U.S. 322, 327, f.n. 7, can at best serve only to emphasize an ambiguity in the Act. And since Congress has left "to the judiciary the task of importing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity . . . It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsh punishment." *Bell* v. *U. S.*, 349 U.S. 81, 83, 75 S.Ct. 620, 622.

It becomes unnecessary, therefore, to argue at length generalities of statutory construction which have been considered elsewhere in determining whether particular single transactions support consecutive sentences for violations of several statutory provisions.[1] "None of these is particularly helpful to us because we are dealing with a unique statute of limited purpose and an inconclusive legislative purpose." *Prince* v. *U. S.*, *supra*, at 325; 405.

Prince has declared that first feloniously entering and then robbing a bank, though violative of two of the Act's provisions, warrant but a single punishment. For virtually identical considerations, first robbing a bank and thereby receiving and then dealing with the spoils of the robbery, likewise warrant no more.

Petitioner's Multiple Sentences Subjected Him to Double Jeopardy

The construction of the Act which we urge, and which we submit is supported by the available legislative history and is inevitably suggested by *Prince*, avoids a serious constitutional question. Petitioner's double punishment for being at once both "taker" and "receiver" of the same stolen bank funds, has in a real sense subjected him to double jeopardy in violation of the Fifth Amendment.

A single bank robbery has been made to serve two prosecutions. (Cf. dissenting opinion of Douglas and Black, *JJ.*, concurring, *Gore* v. *U. S.*, 357 U.S. 386, 396, 78 S.Ct. 1280, 1285.) Such dual use of the same incriminating facts runs counter to the Founders' concern that an accused be protected against multiple punishment as well as against successive trials.

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[1] E.g., *Gore* v. *U. S.*, 357 U.S. 386, 78 S.Ct. 1280; *U. S.* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 73 S.Ct. 227; *Blockburger* v. *U. S.*, 284 U.S. 299, 52 S.Ct. 180.

Madison's original proposal in the House provided: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense . . ." (1 Annals of Congress 434.)[8] Later debate did not indicate entire abandonment of Madison's intention to protect against double punishment.

Recently, in *Green* v. *U. S.*, 355 U S. 184, 78 S.Ct. 221, this Court was not in agreement as to just how much illumination such constitutional history sheds upon the issue of retrial there involved. We suggest, however, that this history the more clearly supports petitioner's contention here that his double punishment amounts to double jeopardy. His contention has been aided by the construction already given to the Act as one principally designed by Congress to reach the crime of robbery with lesser elements of a consummated robbery merging into and constituting but a single offense with the robbery. *Prince* v. *U. S.*, *supra*. If petitioner's offense is one, and his sentences are multiple, his jeopardy is double. He has been made to suffer twice for what amounts to a single transgression.

The same sovereign cannot punish an accused twice for the same offense consistently with the double jeopardy clause of the Constitution. See *State of Louisiana* v. *Resweber*, 329 U.S. 459, 462; 67 S.Ct. 374, 375; *Ex Parte Lange*, 18 Wall. 163.

[8] See discussion in dissenting opinion of Mr. Justice Frankfurter, *Green* v. *U. S.*, 355 U.S. 184.

Conclusion

It is respectfully submitted that the judgment below should be reversed. Petitioner's motion should be granted and the cumulative sentence imposed upon him under subsection (c) of the Act should be vacated.

Respectfully submitted,

JEROME A. COOPER
1329 Brown-Marx Building
Birmingham, Alabama
Attorney for Petitioner

No. 137

In the Supreme Court of the United States

OCTOBER TERM, 1958

LURTON LEWIS HEFLIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys,
Department of Justice, Washington 25, D. C.

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 137

LURTON LEWIS HEFLIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 23–24) is reported at 251 F. 2d 69. That court's prior opinion is reported at 223 F. 2d 371. The opinion of the District Court (R. 20) denying petitioner's motion to correct sentence is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1958. The petition for a writ of certiorari was filed on March 31, 1958, and was granted on June 30, 1958 (R. 25, 357 U. S. 935). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner, who is now in custody under an admittedly valid ten-year sentence for bank robbery, may at this time and in this proceeding attack a year-and-a-day consecutive sentence imposed under a count charging the receipt, concealment, and disposal of the stolen money.

2. Whether a person who has been convicted of both robbing a bank and later disposing of the proceeds may be punished by consecutive sentences under 18 U. S. C. 2113.

3. Whether separate punishment for these offenses constituted double jeopardy.

STATUTES INVOLVED

1. 18 U. S. C. 2113, commonly called the Bank Robbery Act, provides in pertinent part as follows:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

* * * * *

2. Subsection (c) as originally passed in 1940, 54 Stat. 695, 12 U. S. C. (1946 ed.) 588b (c), read as follows:

> (c) Whoever shall receive, possess, conceal, store, barter, sell, or dispose of any property or money or other thing of value knowing the same to have been taken from a bank in violation of subsection (a) of this section shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

3. 28 U. S. C. 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * *
>
> The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.
>
> * * * * *

4. Rule 35 of the Rules of Criminal Procedure is as follows:

> The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the

judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

STATEMENT

On February 26, 1954, Lurton Lewis Heflin, Jr., and two others were indicted in five counts growing out of a 1953 bank robbery. Count 1 charged a robbery from the person of $53,172.73 under 18 U. S. C. 2113 (a), *supra*, pp. 2–3 (R. 7–8). Count 2 charged them with stealing and carrying away the bank funds in violation of 18 U. S. C. 2113 (b), *supra*, p. 3 (R. 8–9). Count 3 charged that in committing the bank robbery they put the lives of 12 people in jeopardy by use of pistols and revolvers in violation of 18 U. S. C. 2113 (d), *supra*, p. 3 (R. 9–10). Count 4 charged that between January 23, 1953, and February 24, 1954, they had concealed and disposed of the stolen funds in violation of 18 U. S. C. 2113 (c), *supra*, p. 3 (R. 10). Count 5 charged that between January 1, 1953 and February 24, 1954, they conspired to commit the previous offenses in violation of 18 U. S. C. 371 (R. 11–12).

Petitioner was tried alone and on May 15, 1954, was convicted by a jury on all five counts (R. 4). He was sentenced to consecutive sentences as follows:—10 years on count 3; 5 years on count 1; 3 years upon count 5; 1 year and 1 day on count 2; and 1 year and 1 day upon count 4—a total of 20 years and 2 days (R. 4). He filed notice of appeal (R. 5). One of the errors urged upon appeal was the invalidity of the

sentences imposed under counts 1, 2, 3 and 4, all based upon the Bank Robbery Act. *Heflin* v. *United States,* 223 F. 2d 371, 373. Upon confession of error by the government, the Court of Appeals found that subsections (a), (b) and (d) of Title 18, U. S. C., Section 2112, *supra,* pp. 2–3, create different maximum punishments for bank robbery and therefore only a single sentence should have been imposed under counts 1, 2 and 3. The court held, however, that "receiving stolen money and conspiracy are offenses separate from bank robbery, and consist of distinctly different elements." *Heflin* v. *United States, supra,* 223 F. 2d at 376.

The Court of Appeals on September 6, 1955, remanded the case for resentencing (R. 6, 12–13). The District Court on September 14, 1955, corrected the judgment by eliminating counts 1 and 2 and imposing the same sentences previously given on the remaining counts, so that petitioner's total sentence was reduced to 14 years and 1 day (R. 6, 13–15).

This Court decided *Prince* v. *United States,* 352 U. S. 322, on February 25, 1957. On May 14, 1957, petitioner filed a new motion under either Rule 35, F. R. Crim. P., or 28 U. S. C. 2255, to correct his sentence. He again complained of his sentence under both subsections (c) and (d) of 18 U. S. C. 2113 and stated that the *Prince* case was now controlling (R. 7, 16–17). The District Court denied the motion (R. 7, 20), and again petitioner appealed (R. 7, 21).

The Court of Appeals in a *per curiam* opinion noted that it had previously

> expressly held that Heflin was not entitled to the relief he here seeks. In the absence of a claim that such prior judgment of this court was in some way brought about under circumstances that would deprive the court of the power to act, we cannot now review or reconsider that judgment. [R. 24, *Heflin* v. *United States*, 251 F. 2d 69, 70.]

But the Court of Appeals also stated:

> It is not inappropriate, however, to say that we think it perfectly clear that the offenses set out in Sections (c) and (d) are distinct crimes and neither is merged into the other. [R. 24, *Heflin* v. *United States, supra*, 251 F. 2d at 70].

SUMMARY OF ARGUMENT

I

The preliminary question in this case is one of jurisdiction. Petitioner is now in custody under an admittedly valid ten-year sentence for bank robbery. He has not completed service of this sentence (nor a consecutive conspiracy sentence). Under these circumstances, even if his contentions as to his consecutive sentence of a year and a day (the sentence challenged here) are correct, the motion under 28 U. S. C. 2255 does not properly lie because he cannot be released from custody upon a judgment in his favor. Cf. *McNally* v. *Hill*, 293 U. S. 131, so ruling with respect to habeas corpus, the prototype of Section 2255.

Under Rule 35, F. R. Crim. P., petitioner may make a motion at any time to correct an illegal sentence. But since this is a motion in the criminal case it can be reviewed only by petition for a writ of certiorari

filed within thirty days after judgment in the Court of Appeals. Rule 22 (2) of the Rules of this Court. Therefore, if petitioner seeks review of his denial of relief under Rule 35 he is untimely in the present proceeding since his petition for certiorari was filed more than thirty days after the Court of Appeals' judgment.

However, recognizing that petitioner can again raise the legality of his sentence under Rule 35, we proceed to the merits.

II

Subsection (c) of the Bank Robbery Act, 18 U. S. C. 2113, *supra*, p. 3, punishes any person who "receives, possesses, conceals, stores, barters, sells or disposes," of property known to have been stolen from a federally insured bank. Petitioner claims he cannot be punished under this section because he was punished as the robber. He relies largely upon *Prince* v. *United States*, 352 U. S. 322, which held that Congress did not intend separately to punish the crime of entering a bank with intent to rob, and the consummated robbery. However, the elements of the offense of disposal bear a different relationship to the elements of a bank robbery than do the elements of the crime of entry; also, the legislative history is different from that involved in *Prince*.

A. 1. The legislative history shows that the portion dealing with *disposition* of the proceeds of a bank robbery was passed at the instance of the Attorney General in 1940 (after the original 1934 Act with respect to bank robbery, and the 1937 amendments) and was intended to create a separate substantive offense. Petitioner does not deny this but argues that

this offense should not be applied to a participant in the robbery.

The short answer is that to accomplish this meaning petitioner is in effect amending the Act to read: whoever disposes, etc. of money "received from a person" who participated in the robbery, shall be punished. Congress, instead, used all-inclusive language which covers both the robber and the "fence" who did not himself rob.

2. Furthermore, the legislative history indicates that the wording of the "disposal" section came directly from the National Stolen Property Act and the Kidnapping Act; in turn, that wording came from the National Motor Vehicle Theft Act. Therefore, presumably, the words have the same purpose and scope in all the statutes. By 1940, when this "disposal" section was added to the Bank Robbery Act, the other acts had been interpreted as permitting separate punishment of one person who both transported and also disposed of stolen property.

B. 1. Since new and independent conduct is indispensable to accomplish the disposal of the "loot" after the bank robbery, there is reason to suggest that there should be a separate punishment for the added criminal acts. The action necessary to "dispose" of something is additional to that required to "take" it. This is why the *Prince* case, *supra,* does not apply here. There, the heart of the crime was the theft. The entry with intent to rob was held to have merged into the consummated robbery. This cannot be said of the provision with respect to the proceeds. Disposal of the loot necessarily must come after a consummated

robbery, and involves an independent criminal impulse and separate acts; it cannot merge with the robbery itself.

2. In the government's brief in *Woody* v. *United States*, No. 135, this Term, we point out that the rule of lenity applies where Congressional intent is unclear with respect to interpreting one single act as subject to consecutive punishment. But *Ladner* v. *United States*, No. 2, this Term, decided December 15, 1958, makes clear that the considerations are different where there are separate acts of criminality as a result of separate impulses. Since here the subsection at issue (subsection (c)) punishes an act separate from the robbery itself, both the language of the statute and the legislative history show that Congress intended to provide an added punishment for the distinct violations.

3. In particular, subsection (c) clearly covers the robber when he so conceals or disposes of the proceeds that they are not recovered—as here. Society's special and separate interest in deterring and punishing that conduct is apparent.

III

Petitioner also raises the question of whether separate punishments for both robbery and disposition of the stolen proceeds by one person violate the double jeopardy provision of the Constitution. This contention clearly has no merit and petitioner does not labor it. As shown, *supra*, there is in this case more than one act of criminality. As such, there is no constitutional barrier to double punishment even under the view of the dissenting opinions in *Gore* v. *United States*, 357 U. S. 386.

ARGUMENT

I

PETITIONER, WHO IS NOW IN CUSTODY UNDER AN ADMITTEDLY VALID TEN-YEAR SENTENCE FOR BANK ROBBERY, CANNOT AT THIS TIME AND IN THIS PROCEEDING ATTACK HIS YEAR-AND-A-DAY CONSECUTIVE SENTENCE FOR DISPOSING OF THE PROCEEDS

In the government's brief in opposition to the petition for a writ of certiorari, we pointed out that there is an initial problem of jurisdiction in this case. Petitioner has not yet completed service of the admittedly valid ten-year sentence for bank robbery which precedes the one-year-and-a-day sentence now under attack. Thus, even if his contentions are correct, he cannot be released from custody.

A. Under these circumstances we do not think his motion properly lies under 28 U. S. C. 2255. By unbroken tradition, both in this country and in England, the relief afforded by the writ of habeas corpus is to protect against unlawful detention and the writ will be granted only when it will result in the prisoner's immediate release. Therefore, when consecutive sentences are imposed, a sentence which the prisoner has not begun to serve cannot be questioned, because it is not the cause of the prisoner's restraint at the time he seeks the relief of the court. *McNally* v. *Hill*, 293 U. S. 131, 138.

The same is true as to a proceeding under Section 2255. The sole purpose of enacting this section was "to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum." *United States* v.

Hayman, 342 U. S. 205, 219. Accordingly, it has been held that relief under Section 2255 cannot be granted where the prisoner is subject to another concurrent sentence which is concededly valid [1] or, as here, where the sentences are consecutive.[2] See *United States* v. *Morgan,* 346 U. S. 502, recognizing that custody under the sentence attacked is essential to a proceeding under 28 U. S. C. 2255.

B. Under Rule 35, F. R. Crim. P., *supra,* pp. 4–5, a motion to correct an illegal sentence may be made at any time. However, such a motion is in the criminal case. *United States ex rel. Coy* v. *United States,* 316 U. S. 342. As such, the petition for a writ of certiorari, filed more than thirty days after the judgment of the Court of Appeals sought to be reviewed, is out of time under Rule 22 (2) of the Rules of this Court.[3]

We recognize, however, that if petitioner should properly prevail under Rule 35, the same issue could be raised by a new motion under that rule, and to that extent the question is not academic at this time. Accordingly, we discuss in Points II and III, *infra,* the merits of petitioner's contention that separate sen-

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[1] *Oughton* v. *United States,* 215 F. 2d 578, 579 (C. A. 9), certiorari denied, 352 U. S. 975; *United States* v. *McGann,* 245 F. 2d 670, 672 (C. A. 2); *Lambert* v. *Schneckcloth,* 241 F. 2d 711, 712 (C. A. 9).

[2] *Hoffman* v. *United States,* 244 F. 2d 378, 381 (C. A. 9).

[3] The same time limitations would apply if the assumption is made that petitioner's application could be considered as one in the nature of a writ of error coram nobis, despite the future possibility of a proceeding under 28 U. S. C. 2255. Such a motion or proceeding is also in the criminal case. *United States* v. *Morgan,* 346 U. S. 502.

tences could not be imposed for bank robbery and disposition of the loot.[4]

II

THE LANGUAGE AND LEGISLATIVE HISTORY OF THE BANK ROBBERY ACT INDICATE THAT CONGRESS INTENDED TO CREATE SEPARATE OFFENSES FOR ROBBING A BANK AND DISPOSING OF THE STOLEN FUNDS, WHETHER OR NOT THE DISPOSAL OF THE FUNDS WAS BY A PERSON WHO PARTICIPATED IN THE ROBBERY

Subsection (c) of 18 U. S. C. 2113, *supra*, p. 3, punishes any person who "receives, possesses, conceals, stores, barters, sells, or disposes of" any money or thing of value known to have been stolen from a federally insured bank. Petitioner argues that, while this is a separate offense from the robbery, there cannot be separate punishment for that offense against one who participated in the robbery. He relies largely on *Prince* v. *United States*, 352 U. S. 322, for his position that Congress did not intend to punish separately the robbing of a bank and the disposition of the money taken in the robbery. In that case the Court held that the crime of entry into a bank with intent to rob, which could be a peaceful entry, was not intended by Congress to be a separate offense from the consummated robbery—that the provision with re-

[4] Since the substantive issue of sentencing presented in this case turns on the allegations on the face of the indictment (*i. e.*, that petitioner was himself a participant in the robbery), we do not urge that, aside from the question of custody, Section 2255 would be unavailable to petitioner. See the discussion in the Government's brief in *Woody* v. *United States*, No. 135, this Term. For the same reason, we now believe that a motion under Rule 35, F. R. Crim. P., would be an appropriate proceeding.

spect to unlawful entry was designed to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime. However, the Court there noted, 352 U. S. at 325, that it was—

> * * * dealing with a unique statute of limited purpose and an inconclusive legislative history. * * * The question of interpretation is a narrow one, and our decision should be correspondingly narrow.

The elements of the offense here involved (receipt and disposition of the stolen funds) bear a different relationship to the elements of the crime of robbery than do the elements of the crime of entry with which *Prince* was concerned. And the legislative history of the enactment at issue here is different from that involved in *Prince*. Both, we believe, show a Congressional purpose to make the disposition of stolen funds a separate crime, even when the funds are disposed of by a person who participated in the robbery.

A. THE STATUTE PUNISHING DISPOSITION OF THE PROCEEDS OF THE ROBBERY WAS PASSED LATER THAN THAT PUNISHING THE ROBBERY, AND SERVES A DIFFERENT PURPOSE

1. While the bank robbery provisions were substantially complete by 1937, it was not till June 29, 1940, that Congress saw fit to enact 54 Stat. 695, punishi ; disposition of the proceeds of the robbery. As originally passed, this subsection provided:

> (c) Whoever shall receive, possess, conceal, store, barter, sell, or dispose of any property or money or other thing of value knowing the same to have been taken from a bank in viola-

tion of subsection (a) of this section shall be fined not more than $5,000 or imprisoned not more than ten years, or both. [54 Stat. 695; 12 U. S. C. (1946 ed.) 588b (c).]

The legislative history, although short, is to the point. Both the House and Senate passed the Act without comment, amendment, or debate. 86 Cong. Rec. 2314, 8940. The House and Senate reports are composed for the most part of almost identical letters from the then Attorney General, Robert H. Jackson, proposing the Act in the form in which it was finally passed. House Report No. 1668, 76th Cong., 3d Session; Senate Report No. 1801, 76th Cong., 3d Session. The letter states in part:

> * * * Under existing law, it is a *separate substantive offense* knowingly to receive or possess stolen property transported in interstate or foreign commerce in violation of the National Stolen Property Act (U. S. C., title 18, sec. 416). Existing law likewise makes it an offense knowingly to receive, possess, or dispose of money or property paid as ransom in violation of the Federal Kidnaping Act (U. S. C., title 18, sec. 408c–1).
>
> On the other hand, the Federal bank robbery statute is not implemented in this manner. The statute does not make it a *separate substantive offense* knowingly to receive or possess property stolen from a bank in violation of the Federal Bank Robbery Act (U. S. C., title 12, sec. 588a–d).
>
> Accordingly, I enclose herewith a proposed bill making it an offense to receive, possess, conceal, barter, sell, or dispose of any money

> or property knowing that the same has been feloniously taken from a bank in violation of the Federal Bank Robbery Act. [Emphasis added.]
>
> * * * * *

There can thus be no doubt that Congress did intend the statute relating to disposition of the proceeds to be a substantive offense separate from the robbery.

Petitioner does not deny that the Act creates a separate offense. He argues that the separate offense does not apply to the participant in the robbery. Both the language and the legislative history suggest otherwise. The terms of subsection (c), read naturally, cover action subsequent to the robbery both by the robber and by a separate receiver. While "receiving" and "possessing" would inevitably be an immediate part of the robbery, the other words used in the subsection—particularly "barter, sell, or dispose"—relate to acts *subsequent to the robbery* which could and would be performed by the person in possession of the proceeds, *i. e.*, by one who participated in the robbery. If only the confederate or "fence" (who did not himself rob) were intended to be covered, the statute would logically read "whoever possesses, sells, disposes of, * * * money *received from a person* who participated in the robbery." The use by Congress of all-inclusive language which covers both the taker and the "fence" supports the conclusion that the purpose was not only to create a separate offense, but to include in its coverage everyone, including the robber, who violates its terms.

2. Moreover, the words of present subsection (c) were taken from the National Stolen Property Act and the Kidnapping Act.[5] The intent presumably was that they would have the same purpose and scope as the words in those Acts. These terms in the National Stolen Property Act, 18 U. S. C. 2315, came in turn explicitly and directly from the National Motor Vehicle Theft Act, 18 U. S. C. 2313. See House Report No. 1462, 73d Congress, 2d Session, p. 2.[6] While in those other crimes (in contrast to bank robbery) the act of stealing would often not be a federal crime, the act of transporting stolen goods (which those acts punished) may be deemed analogous to the robbery made a crime by the federal Bank Robbery Act. In 1940, when the statute here involved was passed, it had already been well established in decisions of the courts of appeals (which the Attorney General must have known) that a transporter of a stolen vehicle, or of stolen goods, could be *separately* punished for concealment or disposition of such articles. *Doll* v. *Johnston,* 95 F. 2d 838 (C. A. 9, 1938), certiorari denied, 304 U. S. 574; *Chrysler* v. *Zerbst,* 81 F. 2d 975 (C. A. 10, 1936); *York* v. *United States,* 299 Fed. 778 (C. A. 6, 1924). There is thus little reason to believe that

[5] The National Stolen Property Act at that time, 18 U. S. C. (1946 ed.) 416, used the words, "received, conceal, store, barter, sell, or dispose * * *." The Kidnapping Act at that time, 18 U. S. C. (1946 ed.) 408c–1, used "receives, possesses, or disposes". The seven different verbs used in the instant provision are obtained by combining these two acts.

[6] Cf. same or similar wording in National Stolen Cattle Act, 18 U. S. C. 2317; Postal Matter, 18 U. S. C. 1708; Interstate Freight, 18 U. S. C. 659.

the Attorney General, when he suggested the statute, or Congress, when it enacted it, deemed it inapplicable to a participant in the robbery.

3. The only other change in the Act which is relevant to our problem occurred in the Title 18 codification passed on June 25, 1948, 62 Stat. 796. Previously, the "disposition" provision, 12 U. S. C. (1946 ed.) 588b (c), *supra*, p. 4, fixed punishment as:

> shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

The 1948 provision, now in effect (18 U. S. C. 2113 (c)), concludes (*supra*, p. 3):

> shall be subject to the punishment provided by said subsection (b) for the taker.

The 1948 revision provided generally with respect to offenses of theft, and in particular with respect to the larceny provisions of Section 2113 (b), that the taking of less than $100 would be a misdemeanor. The reference to the same punishment as "for the taker" was a short-hand way of making the same distinction. We do not believe it indicates a construction one way or the other of the coverage of subsection (c).

In the brief discussion on the floor of the Senate in response to an inquiry from Senator Taft for explanation of the Title 18 codification bill, Senator Wiley (of the Judiciary Committee) stated, "The original intent of Congress is preserved." 94 Cong. Rec. 8721. Also see Senate Report No. 1620, p. 1, 80th Congress, 2d Session. Consequently, to read any special significance into the use of the word "taker" is contrary to the express purpose of Congress to make no substantial changes in Title 18. The change

in degree of punishment in subsection (c) to conform to the difference in amount stolen still remains fully consistent if we view the robber and disposer (in a particular case) as the same person. The punishment in subsection (c) does not depend on the amount "taken" but on the amount *disposed of*. That could be either by the robber or by another.

B. SINCE DISPOSITION OF STOLEN FUNDS NECESSARILY INVOLVES CRIMINAL ACTS BEYOND THOSE INVOLVED IN THE ROBBERY ITSELF, THERE IS REASON WHY A PARTICIPANT IN THE ROBBERY SHOULD BE SEPARATELY PUNISHED FOR THE ADDITIONAL CRIMINAL ACTS

1. As already noted, subsection (c) punishes any person who "receives, possesses, conceals, stores, barters, sells, or disposes of" any money or thing of value known to have been stolen from a federally insured bank. We have also pointed out that the act of receiving and possessing may occur at the time of the robbery, but the other acts prohibited (concealing, storing, etc.)—in particular, the act of *disposing* of stolen funds—necessarily involve something subsequent to and apart from the robbery itself. The disposition of the "loot" must of necessity come after the bank robbery and cannot be an element of the robbery. And since the act of disposing of the stolen funds is necessarily an act subsequent to and apart from the robbery, it likewise involves a different intent, and a further act of criminality than that involved in the robbery itself. No doubt every bank robber hopes to dispose of the money taken, but his act of disposing of the money is nevertheless something beyond the robbery itself; it is new and independent

conduct on his part which the law can properly try to deter.

This factor marks an important distinction between the problem of this case and that of *Prince*. In *Prince*, the Court noted (352 U. S. at 328) that "the heart of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is consummated." This cannot be said of the section here involved. In subsection (c), dealing with the stolen funds, the gist of the crime is the intent to get rid of the property. As such, it carries within its magnetic field all the degrees and methods of disposition. By analogy to *Prince*, the lesser offense (like intent to enter in *Prince*) is "receiving." In turn, this element is usually included within "concealing, storing or possessing" and these may merge into "barter, sell or dispose". The "loot" provision thus contains its own degrees and consummation of purpose; it was intended to be a statute punishing acts other than, and subsequent to, the robbery. Moreover, the crime of disposition of the proceeds carries a lesser degree of punishment than robbery, and as we have shown above it was not made a crime either when bank robbery was first made a federal offense in 1934, or when the crimes of larceny and unlawful entry were added in 1937. In sum, all the indications are that Congress did not intend the robbery to merge into the later offense of "disposition".

This Court has on several occasions interpreted comparable criminal provisions as establishing two or more offenses for successive steps in a chain of actions taken for illicit ends. For example, *Morgan*

v. *Devine*, 237 U. S. 632, upheld consecutive sentences for forcibly entering a post office to commit larceny and for then stealing postage stamps at the same time and place. *Burton* v. *United States*, 202 U. S. 344, sustained separate convictions for unlawfully receiving outside compensation for government services, and also for agreeing to receive that very compensation. In *Albrecht* v. *United States*, 273 U. S. 1, the defendants were convicted, under the National Prohibition Act, on separate counts of possessing and selling the same liquor at the same time. *United States* v. *Michener*, 331 U. S. 789, held that consecutive sentences could be imposed on one count charging possession of a plate adapted for counterfeiting and on a second count charging that on the same day the defendant caused such a plate to be made. In all of these cases, the second step was a normal concomitant of the first; but the Court nevertheless accepted the steps as separate and distinct, involving different elements, different proof, and independent criminal impulses.

2. As developed more fully in the government's brief in *Woody* v. *United States*, No. 135, this Term, the recent decisions of this Court involving multiple offenses have related to situations where one single transaction has given rise to consecutive sentences. The rule of lenity applies against permitting multiple punishment for a single transaction unless the Congressional purpose to do so is clear. But nothing in that rule suggests that separate acts of criminality are not separate offenses, or that such separate crimes shall be considered one crime simply because they are

now set out in the same section of a statute. The decision in *Ladner* v. *United States*, No. 2, this Term, decided December 15, 1958, makes clear that the singleness or plurality of the criminal impulse is an important factor on the issue of consecutive punishment, since the Court there remanded the case for determination as to whether the consecutive sentences were imposed for the firing of one shot or for two.

Here, by statutes passed at different times, Congress prohibited action which, so far as the crime of disposing of the money is concerned, would almost never be performed as part of the same transaction as the robbery itself.[1] There is thus no reason to hold that Congress did not intend to punish separately this further act of criminality even when performed by the robber. Under the two sections now involved (subsections (c) and (d)), there necessarily had to be at least two acts, at different times, as the result of different impulses, done for different purposes; there also had to be intents composed of distinct and independent elements of proof; the crimes were established by two separate sections passed at different times with different gists or purposes, and were based on prior statutes which had been interpreted as creating wholly separate crimes. *Supra*, p. 17. In the light of all these factors, there is no occasion, we sub-

[1] We are lodging with the Clerk the original trial transcript. It shows that petitioner did not even carry the money from the bank (Tr. 323). The loot consisted of currency and redeemed E Bonds (Tr. 44). It was counted later at an apartment (Tr. 327–328) in two parts (Tr. 328–329), and split (Tr. 337, 714, 732) and concealed in brown paper bags (Tr. 329). At the time of trial, no money had been recovered (Tr. 41, 43).

mit, to resolve doubt as to punishment by resort to the rule of lenity. Rather, both the language and the legislative history affirmatively show that Congress intended to provide additional punishment for the distinct violations of the separate statutes.

3. In particular, we believe that subsection (c) clearly establishes a separate crime for the robber when he so conceals or disposes of the stolen property that it is not recovered or restored to the rightful owner. As pointed out in footnote 7, *supra*, p. 22, at the time of petitioner's trial the stolen money had not been recovered; it has been so concealed and disposed of by petitioner and his confederates that the law enforcement officials could not find it. In such circumstances—when the robber goes beyond his robbery to keep permanently the loot or its proceeds—society certainly has an additional and special interest to protect, over and above its interest in preventing violent looting. The robber is enriched, and the true owner is permanently deprived of his property. A separate punishment for the separate conduct leading to that added injury is warranted.

III

SEPARATE PUNISHMENTS FOR ROBBERY AND DISPOSITION OF THE PROCEEDS DO NOT PRESENT A CONSTITUTIONAL ISSUE

Petitioner raises but does not labor the contention that separate punishments for the robbery and disposition of the proceeds would violate the constitutional provision against double jeopardy. The contention is clearly without merit. This Court held in *Gore* v.

United States, 357 U. S. 386, 392–3, that multiple punishment for violations of separate statutes arising out of one act of sale would not violate the constitution. This case, as discussed above, necessarily involves more than one transaction, more than one act of criminality. There would be no constitutional barrier to double punishment even under the view of the dissenting opinions in *Gore*. See also *Albrecht* v. *United States*, 273 U. S. 1, *Blockburger* v. *United States*, 284 U. S. 299; and the discussion in the Brief for the United States in the *Gore* case, No. 668, Oct. Term 1957, pp. 38 *ff*.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

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